

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1402

*To be argued by
Jay Goldberg*

United States Court of Appeals

For the Second Circuit

Docket No. 77-1402

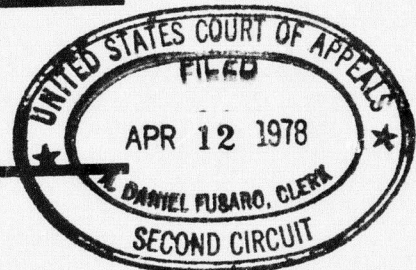
UNITED STATES OF AMERICA,
Appellee,

—v.—

MARION KNUCKLES,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT



Jay Goldberg
*Attorney for Appellant
Marion Knuckles*
299 Broadway
New York, N.Y. 10007
(212) 374-1040

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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- v. -

Docket No. 77-1402

MARION KNUCKLES,

Appellant.

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APPELLANT MARION KNUCKLES' REPLY BRIEF

POINT ONE

THE GOVERNMENT HAS NOT DEMONSTRATED
ON THIS BARREN RECORD THAT: (1) APPELLANT
WAIVED HIS SIXTH AMENDMENT RIGHT WITH
RESPECT TO HIS POST-INDICTMENT STATEMENTS
AND (2) COUNSEL'S FAILURE TO OBJECT
TO THE ADMISSION THEREOF CONSTITUTED THE
WAIVER OF APPELLANT'S CONSTITUTIONAL RIGHT

The Government, of course, does not assert that
the admission of the post-indictment statements was harmless.
The citation by the Government to United States v. Fuentes,
563 F.2d 527, 531 (2d Cir. 1977) is most inappropriate. That case
related to the failure to make timely objection to an eviden-
tiary ruling not of constitutional magnitude.

In the case at bar, unlike Fuentes, we deal with
the claimed waiver of a fundamental constitutional right.
As the Court stated in United States v. Lord, 565 F.2d 831,
839 (2d Cir. 1977):

"Since [defendant] had been indicted prior to his arrest and his right to counsel had therefore attached before he was arrested, the use of his confession at trial was unconstitutional unless he waived his Sixth Amendment right to counsel before he confessed. Massiah v. United States, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976). When Government agents or prosecutors choose to interrogate an indicted, unrepresented defendant, they assume the heavy burden of proving that any inculpatory statements thus obtained were voluntarily given after a valid waiver of the right to counsel. United States v. Satterfield, *supra*; United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970), cert. denied, 400 U.S. 1022, 91 S.Ct. 586, 27 L.Ed.2d 633 (1971) Friendly, C.J., dissenting)."

There are two issues: (1) Has the Government satisfied its "heavy burden" justifying admission? (2) Does the record reflect a true waiver when counsel neglected on trial to object to the evidence?

Where does the record before us indicate the discharge of such "heavy burden"? Objectively, we know appellant would not sign any statement without the presence of counsel (Tr. 353).^{*} Did he appreciate the difference in his rights between a pre-indictment interrogation as opposed to a post-indictment examination? That the Miranda rights were read tells us nothing as to whether appellant understood he was relinquishing both his Fifth and Sixth Amendment rights (see Brewer v. Williams, 430 U.S. 387 [1977]). The only

^{*} See People v. Coleman, 371 N.E.2d 819 (N.Y. 11/22/77), which casts doubt on a claimed oral waiver where defendant refused to sign a writing.

evidence of a knowing waiver is the fact that he made admissions, but as Brewer teaches, that is not enough.

As to the second issue, this Court may properly inquire as to the reason no objection whatever was made by the trial counsel to the introduction of these devastating admissions used with such impact by the prosecutor in summation. It may be true that under the rigid standards followed by this Court, we do not have ineffective assistance of counsel. However, recognizing that we deal with the possible waiver of a fundamental right, did the Court below do all that was necessary to assure itself that there was a "knowing" waiver? We respectfully suggest not. Attention is directed to the proceedings in United States v. Johnson, 562 F.2d 649 (D.C. Cir. 1976). Relief was denied defendant therein because of the extreme care taken by the trial judge to assure there was a voluntary and intelligent waiver of a known right. The case is best described in the concurring opinion of Chief Judge Bazelon who at p. 663 wrote:

"As the opinion points out, the trial judge was particularly sensitive to the possible Miranda problem. By exploring the issue with counsel at trial, the judge assured himself that the failure to object was an informed tactical decision rather than an inadvertent omission, thus obviating the need for a remand for an evidentiary hearing to determine whether counsel made a deliberate strategic waiver.

* * *

"Henry v. Mississippi, supra. The district judge's initiation of this inquiry at trial also eliminated the possible need for a remand had appellant claimed that his counsel had been ineffective in not considering whether there might be a Miranda problem, United States v. DeCoster, 159 U.S.App.D.C. 326, 487 F.2d 1197 (1973). Such action by trial judges assists them in discharging their duty 'to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts,' McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763, 773 (1970), and is especially important in light of the uneven quality of representation available to criminal defendants. See, e.g., Chief Judge Irving R. Kaufman, "Does the Judge Have a Right to Qualified Counsel?," 61 A.B.A.J. 569 (1975); Chief Justice Warren E. Burger, "The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?," 42 Ford.L.Rev. 227 (1973); Chief Judge David L. Bazelon, "The Defective Assistance of Counsel," 42 U.Cinn.L.Rev. 1 (1973).

* * *

"Although noting that the trial record disclosed that 'appellant's counsel did not object to the admission of the confession,' the court in United States ex rel. Snyder v. Mazurkiewicz remanded for an evidentiary hearing on the question of waiver since the record was 'equally devoid of any discussion or dialogue from which any conclusion of waiver by the appellant may be convincingly demonstrated.' 413 F.2d 500, 502 (3d Cir. 1969) (footnote omitted). See also United States ex rel. Gockley v. Myers, 378 F.2d 398 (3d Cir. 1967)."

In the case at bar, the record is devoid of such proof necessary to show the Government discharged its burden of proof or that the failure to raise a trial objection constituted a waiver.

A remand is in order.

POINT TWO

THE COURT ERRED IN CHARGING THAT THE JURY COULD CONVICT IF THEY FOUND THE DRUG TO BE COCAINE

To bring the issue sharply into focus, let us assume that the Court had submitted only cocaine distribution or a conspiracy to distribute cocaine to the jury. Would that survive a Rule 29 motion? The Government's testimonial proof was that cocaine was not packaged or distributed. All that Simpson testified to as to cocaine was personal use by others. And, DEA agents months later found only traces of cocaine on a kitchen utensil in Simpson's apartment. Obviously, on such proof a Rule 29 motion would have to be granted.

On the other hand, had the Court submitted charges of heroin conspiracy distribution alone, a Rule 29 motion would clearly be denied since Simpson's testimony, even without finding contraband, would be enough to take the case to the jury.

However, by submitting alternate theories, one of which was infirm, i.e., as to cocaine, we have no way of determining from the general verdict whether the verdict rested on an insufficient factual and legal basis. Cramer v. United States, 325 U.S. 1 at 36, fn. 45 (1945).

United States v. Ramirez, 482 F.2d 807 (2d Cir. 1975) is clearly inapposite. The proof was sufficient as to both Schedule I and II drugs.

In the case at bar, contrary to the Government's assertion, a Rule 29 motion was made which operates to preserve the issue of insufficiency on any factual theory to be submitted to the jury.

The Government is in error in arguing that counsel below argued only variance. The Stirone case (361 U.S. 218) was pressed and counsel argued that by presenting the jury with the cocaine issue, the Court was "putting something into the indictment that was never before" the grand jury (A. 131).

In view of the specificity of the Grand Jury indictment and obviously the minutes before the Grand Jury, the submission of a theory of liability bottomed on a conspiracy to distribute and distribution of cocaine was a constructive amendment of the indictment and constituted reversible error. See, in particular, United States v. Crocker, 568 F.2d 1049 (3rd Cir. 1977) and United States v. Davis, 501 F.2d 1344 (9th Cir. 1974).

To the same effect, see United States v. White,
569 F.2d 263 at 268 (5th Cir. 1978), where the Court wrote:

"...the substance involved in the
transactions must be the same illegal
substance alleged in the indictment."

As to the conspiracy count, there was a total
failure of sufficient proof as to cocaine both before the
Grand Jury and at trial to warrant a felony charge.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

JAY GOLDBERG
Attorney for Appellant
Marion Knuckles
299 Broadway
New York, New York 10007
(212) 374-1040

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AFFIDAVIT OF SERVICE BY MAIL

Alfred Knauf, being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of age,
and is a principal of the firm Litigation Graphics, 178 Clearmeadow
Drive, East Meadow, New York 11554.

That on the 11th day of April, 1978, deponent served two (2)
copies of the enclosed "Reply Brief for Appellant" upon:

United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

attorney for Appellee in this action, the address designated by
said attorney for that purpose, by depositing said "Reply Brief",
enclosed in a post-paid properly-addresses wrapper, in an
official depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Sworn to before me, this

14 day of APR, 1978


PHILIP R. DERITA
Notary Public, State of New York
No. 204529450
Qualified in Nassau County
Commission Expires March 1980